

Not Species of a Common Genus

Per the Office Action, Species AAA relates to various techniques monitoring a plurality of physiological parameters of a patient to determine activity and sleep quality metric values, as described in paragraphs [0006]-[0017] of the application. Per the Office Action, Species BBB is drawn to paragraphs [0018] and [0019], which describe embodiments that include the monitoring of Species AAA. The embodiments described in paragraphs [0018] and [0019] additionally include delivering a therapy to the patient according to a plurality of therapy parameter sets, and associating the metric values determined according the monitoring of Species AAA with the therapy parameter sets that were in use during the monitoring. For example, paragraph [0019] states “[w]hen the medical device determines a sleep quality metric value or an activity level [according to Species AAA and as described in the associated, preceding paragraphs], the medical device may identify the current therapy parameter set when the value or level is determined, and may associate that value or level with the therapy parameter set.” Furthermore, paragraph [0029] indicates that Species BBB is an advantageous example or use of the monitoring of Species AAA by stating:

...by providing information related to patient activity and the quality of a patient's sleep to a clinician and/or the patient, a system according to the invention can improve the course of treatment of an ailment of the patient, such as chronic pain. For example, using activity and sleep quality information provided by the system, the clinician could evaluate a plurality of therapy parameter sets to identify those which are, or are not, efficacious

The relationship of Species AAA and Species BBB as related and usable together, rather than mutually exclusive species of a common genus, is also illustrated by FIGS. 4-7 of the application. FIGS. 4-6 illustrate techniques for determining sleep quality metric values and other information based on monitoring, i.e., illustrate techniques relating to Species AAA. FIG. 7 illustrates a technique relating to Species BBB in which the values or other information determined according to the monitoring (Species AAA, step 110) are associated with therapy parameter sets.

Species AAA and Species BBB are not mutually exclusive species of a common genus, and therefore the requirement of election between them is improper. Furthermore, contrary to the Office Action, Species AAA and Species BBB are not “substantially dissimilar and structurally divergent means for configuring a medical device to evaluate and/or affect a patient's sleep.” Instead, as illustrated in the preceding discussion, Species AAA and BBB are clearly related and

used together in many embodiments described in the application. As illustrated in the preceding discussion, Species BBB relates to embodiments that include the monitoring of Species AAA, as well as additional elements related to delivery and evaluation of therapy, i.e., relates to a particular use of the monitoring according to Species AAA. Withdrawal of Election of Species Requirement with respect to Species AAA and BBB is respectfully requested.

Claim 1 is Generic

The Office Action stated that no claim was generic. Per the Office Action, claim 1 is included in Species AAA. Furthermore, each claim identified in the Office Action as being in Species BBB requires all of the limitations of claim 1, and claim 1 requires no material element additional to those required by the claims identified as being in Species BBB. MPEP 806.04 states that, "[i]n general, a generic claim should require no material element additional to those required by the species claims, and each of the species claims must require all the limitations of the generic claim." Claim 1 satisfies this guideline. Additionally, Applicant notes that most of the claims identified as being in Species BBB in fact depend from claim 1, clearly illustrating that claim 1 is generic to both Species. Applicant submits that claim 1 is generic.

CONCLUSION

All claims in this application are in condition for allowance. Applicant respectfully requests withdrawal of the Election of Species Requirement and prompt allowance of all pending claims.

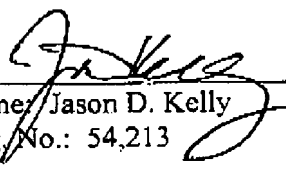
Please charge any additional fees or credit any overpayment to deposit account number 50-1778. The Examiner is invited to telephone the below-signed attorney to discuss this application.

Date:

2-21-08

SHUMAKER & SIEFFERT, P.A.
1625 Radio Drive, Suite 300
Woodbury, Minnesota 55125
Telephone: 651.735.1100
Facsimile: 651.735.1102

By:


Name: Jason D. Kelly
Reg. No.: 54,213